UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CALVARY BAPTIST CHURCH SENIOR HOUSING D/B/A CALBC HOUSING DEVELOPMENT FUND COMPANY, INC.[1]

Employer

and Case No. 29-RC-9749

LOCAL 377, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, UFCW, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Peter Pepper, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that Calvary Baptist Church Senior Housing d/b/a CALBC Housing Development Fund Company, Inc., herein called the Employer, is a New York State corporation, with its principal office and place of business located at 160-60 Claude Avenue, Jamaica, New York, herein called the Jamaica facility, and is engaged in the business of operating residential housing. During the past calendar year, in the course and

[1] The Employer's name appears as amended at the hearing. (See Board Exhibit 2.)

conduct of its operations generally, the Employer has derived gross revenues in excess of $500,000, and has purchased and received at its Jamaica facility, goods, products and materials valued in excess of $5,000, directly from suppliers outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Local 377, Retail and Wholesale Department Store Union, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time maintenance employees, but excluding all other employees, guards and supervisors as defined in the Act.

The only issue raised at the hearing was whether building superintendent Warren Young is a supervisor, as asserted by the Employer, or an employee, as asserted by the Petitioner.. The Employer's witnesses were Warren Young and Michelle Haynes, the Employer's site manager. The Petitioner did not call witnesses.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc*., 121 S.Ct. 1861, 167 LRRM 2164 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985); *see also Boston Medical Center Corporation*, 330 NLRB No. 30 at 83 (1999). It is not satisfied merely by making "general, conclusory claims" that an alleged supervisor assigns, directs or disciplines

employees, or possesses any of the other supervisory indicia. *Crittenton Hospital*, 328 NLRB No. 120 at 1 (1999). "Paper authority," such as a written job description, is insufficient proof of supervisory status. *Crittenton*, 328 NLRB No. 120 at 1.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, Section 2(11) "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *Kentucky River*, 121 S.Ct. at 1867. The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees," does not establish supervisory status. *Chicago Metallic*, 273 NLRB at 1689. In enacting Section 2(11) of the Act, "Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in Providence Hospital,* 320 NLRB 717, 725 (1996).

Accordingly, the Board has "often held that building superintendents were nonsupervisory employees." *Cassis Management Corporation*, 323 NLRB 456, 458 (1997) (citing *Hagar Management Corp.,* 313 NLRB 438 (1993); *J.R.R. Realty Co.,* 273 NLRB 1523 (1985), *enf'd.,* 785 F.2d 46 (2d Cir. 1986); *Elias Mallouk Realty Corp.,* 265 NLRB 1225 (1982)). For example, the Board determined that a building superintendent who "interviewed

job applicants and eliminated those he deemed to be unqualified" was not a supervisor, in part because the Respondent's General Manager "conducted his own interviews with the qualified candidates before making a hiring decision." *Cassis,* 323 NLRB at 458. Although the building superintendent met with the porters and handymen each morning and gave them instructions "if something had occurred during the night that they were required to deal with before they returned to their normal routine," the Board found that his "limited role in the parceling out of tasks to the other employees [was] attributable to [his] status as the most senior employee and the fact that he lived on the premises," and did not require independent judgment. *Cassis,* 323 NLRB at 458.

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. *Crittenton Hospital*, 328 NLRB No. 120 (1999). The Board and federal courts "typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Brusco*, 247 F.3d at 278 (citing *Hilliard Development Corp*., 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)). By contrast, serving as a conduit for management's instructions or for the assignment of predetermined tasks, without more, does not elevate an employee into the supervisory ranks. *See McCollough Environmental Services,* 306 NLRB 1565, 1566 (1992); *see also Quadrex Environmental Co.,* 308 NLRB 101 (1992). The Board has classified as "merely routine or clerical" such duties as making up employees' schedules, giving them the schedules, posting the schedules and granting time off. *National Livery Service*, 281 NLRB 698, 702 (1986).

With regard to the authority to discipline employees, the power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." *Crittenton Hospital*, 328 NLRB No. 120 at 2 (citing *Passavant*

Health Center, 284 NLRB 887, 889 (1987). Writing reports on incidents of employee misconduct is not a supervisory function if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher,* 214 F.3d at 265 (citing *Meenan Oil Co*., 139 F.3d 311 (2nd Cir. 1998); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P*., 323 NLRB 890 (1997). Likewise, an employee who inspects the work of others and either reports on improper work performance, or orders employees with performance problems to leave a work-site, is not a supervisor unless s/he has the authority to effectuate ultimate personnel decisions. *See Somerset Welding and Steel*, 291 NLRB 913, 914 (1988); *see also Quadrex*, 308 NLRB at 101.

The record reflects that the Employer owns and operates a 100-unit residential building. The petitioned-for maintenance unit consists of three individuals: Wilton Stevens, a maintenance man/handyman; Trevor Robinson, a porter/custodian; and Warren Young, the superintendent and alleged supervisor. Young's compensation, unlike that of the other maintenance personnel, includes a rent-free apartment in the building. Young reports directly to the site manager, Michelle Haynes, who in turn reports to the Board of Directors. According to the Employer's organizational chart and written job descriptions, Young "supervises" the other two maintenance employees, and Haynes "closely supervises" all three.

Young's four-paragraph job description also enumerates non-supervisory responsibilities such as "carrying out general maintenance and routine repairs…will operate and be familiar with Project' mechanical systems…responsible for 24-hour emergency calls...prepare a monthly maintenance report." The job description for the porter/custodian consists entirely of cleaning duties, whereas that of the maintenance man/handyman stresses his responsibility for minor repairs. When the superintendent or handyman is absent, the maintenance man/handyman substitutes for the superintendent, and the porter/custodian backs up the maintenance man/handyman. The duties of the three maintenance employees overlap,

and there are a series of tasks that all three members of the maintenance staff perform on a daily basis. These include taking care of the garbage and recycling, maintaining the outside of the building, vacuuming the lobby and basement, mopping, sweeping and buffing each of the building's seven floors, and maintaining the laundry room and community room.

Further, it appears from the record that tenants generally contact the management office to request maintenance work in their apartments. Every morning, work orders itemizing these maintenance tasks are prioritized by Haynes. Young testified that normally, he performs the maintenance work on all work orders, but he gives any overflow to the maintenance man. In addition, Haynes asserted, without further elaboration, that Young "sets up the schedule" for the two other maintenance employees. However, there is no evidence that Young exercises independent judgment in the assignment of work. For example, the Employer does not claim that Young makes assignments based on an assessment of employees' relative skills and abilities. *See Brusco*, 247 F.3d at 278 (citing *Hilliard Development Corp*., 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)). In assigning work orders to the maintenance man, Young merely acts as a conduit for assignments that have been prioritized by Ms. Haynes. *See McCollough Environmental Services,* 306 NLRB 1565, 1566 (1992); *see also Quadrex Environmental Co.,* 308 NLRB 101 (1992). Moreover, making up schedules for other employees has been classified as "merely routine or clerical." *National Livery Service*, 281 NLRB 698, 702 (1986).

The record further reflects that sick leave and vacation time must be approved by the management office. If employees need to leave early, they have to obtain Haynes' permission, since Young does not have the authority to send sick employees home. Forms for sick leave, personal days and overtime, must be approved by Haynes and signed by Young, Haynes and the Board President. Employees do not receive holiday pay until the appropriate form is signed by the Board President. Haynes testified that any overtime that is performed

has to first be approved by the management office, except in "an extreme emergency." However, even if such overtime assignments are occasionally made by Young, without consulting with management, the Board will not find an employee to be a supervisor solely because he or she occasionally assigns work to other employees on an emergency basis. *See Quadrex*, 308 NLRB 101 (1992)(emergency assignment of overtime).

With regard to Young's alleged authority to effectively recommend the termination of employees, he testified as follows:

Q: Did you give input and suggest that a security person be terminated because you, they had done something--

A: Sure, I would tell the manager there's a problem with security.

Q: So, you told Ms. Haynes?

A: Sure, sure.

Q: Anything specific? Was it a sleeping on the job?

A: Yes. We busted a couple of them sleeping on the job.

Q: That's not unusual.

A: Right.

Q: So, this was after hours, I presume?

A: Yes.

Q: You did your job.

A: Right, right.

Q: This was not appropriate.

A: Exactly.

Q: And was it done?

A: Yes. I'm hesitating.

Q: I have no further questions.

This testimony does not establish whether Young recommended the discharge of the guards, whether he used independent judgment in making the recommendation, or whether the recommendation was followed. Although Young's "discharge recommendation" was allegedly made to Ms. Haynes, who could have provided some insight into whether the recommendation was followed, she was not asked about the incident and did not corroborate any aspect of the story. Earlier in the hearing, moreover, Haynes testified that the security function is not performed by the Employer's employees, but by "independent contractors" working for Burns International Security. Thus, it is not clear how Young could be their supervisor. Haynes conceded that there has never been a termination or layoff among her maintenance staff.

Haynes confirmed the accuracy of a portion of the Employer's official job description which states that her responsibilities include "hiring employees." By contrast, Young's job description merely states that a superintendent "assists" in hiring maintenance personnel. Young testified that he "recommended" Trevor Robinson for his present job as porter/custodian, but the record does not indicate the basis for this recommendation. Robinson, who was hired in January of 2000, previously performed security work at the Employer's facility, for Burns International Security.

There were five applicants for the porter/custodian position now held by Robinson. Young "sat in" on the interviews of all five. These interviews were conducted by Stratton Lee, who was the building's managing agent at the time. Haynes, who was present at "at least three" of these interviews, contended that "if there were any particular questions, [Young] asked those." Moreover, she asserted that Young "interviewed" all five applicants, although she later explained that by "interviewed," she meant that Young was physically present when Stratton Lee conducted the interviews. With respect to the selection of Robinson, Young testified that "if you're asking me if I actually sat down and we had a

discussion, you know, and they were actually seeking out my opinion to make that decision, then I can't say that's a fact. Because before that time they knew I was recommended [sic] Mr. Robinson for the job. Like I said he worked in security. We were all familiar with him. And up until that point, you know, they knew I wanted him to work there."

In addition, during the last few years, the Employer has hired temporary employees each summer to help strip the floors. Managing agent Stratton Lee interviewed the applicants for temporary positions, while Young observed. After the interviews, according to Haynes, Young was asked for his opinion, and stated that, "The persons that came forth were temporary, were good for the jobs that they were hired to do." Similarly, Young testified that "they asked me what I thought of the person," and that in most cases, "I would tell the manager that I thought this person would work out." However, Haynes admitted that final hiring decisions "came from the management office and myself."

In the absence of any evidence identifying the basis for Young's hiring recommendations, or the factors he considered in deciding whom to recommend, the record does not establish that he used independent judgment in making these recommendations. Further, in making these recommendations, it not clear whether Young indicated who would be the best candidate, or simply agreed with management that all or most candidates were qualified for the positions applied for. Moreover, the Employer concedes that final hiring decisions were made by the management office, not by Young. *See Cassis,* 323 NLRB at 458. The record does not reflect to what extent Young's recommendations were relied upon.

In its brief, the Employer argues that Young's supervisory status is evidenced by his "assist[ance] in evaluations of the maintenance employees, with his input heavily relied upon." The basis for this argument is Haynes' testimony that in February, 2001, she "asked how it was with his two maintenance men…So, he told me how he felt about them. And I in turn did a one-page, one-paragraph memo, saying that they satisfactorily met the requirements

of their job duties." However, the record is devoid of evidence that Young's input was a factor in the promotion, reward or discipline of the maintenance men, or the exercise of any other Section 2(11) indicium. The Board has ruled that since "Section 2(11) does not include 'evaluate' in its enumeration of supervisory functions…when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Elmhurst Extended Care Facilities, Inc.,* 329 NLRB No. 55, 162 LRRM 1317 (1999). Moreover, the Employer's official job description includes "reviewing and evaluating employee performance" among the tasks performed by site managers, but not among the tasks performed by superintendents. Haynes conceded that she performs this function.

Lastly, the Employer contends in its brief that Young "has responsibility for employee grievances," relying on the following testimony:

> Q: Is there ever, has there ever been—probably not, but there may have been in this environment where employees may have had a grievance and had, or a problem. The two individuals or the two positions that are custodian and handyman, a particular problem which Mr. Young had to solve. A grievance, a grievance with management, any problems in the work place which he solve independently of either the site manager, which I guess is his direct supervisor, or the managing agent.
>
> A: I'm not fully aware of any direct grievances. In the past there was one instance, but I can't recall what the subject was. That under the three, I won't say three, I'll say at least two of them have come, which would be Warren and Stephan.[2] And this was past years. If they wanted to speak to me, as the manager, on a particular subject. But I'm not fully aware of, at this time, if it was any particular situation that was spoken to me as the manager of other than, I would say like a pay, of a pay raise.
>
> Q: A pay raise. Would they go to Mr. Young or would go directly perhaps to you?
>
> A: Regarding a pay raise if they had a grievance about that, they would go –
>
> Q: A grievance about, or a grievance or a problem would they go directly to Mr. Young?
>
> A: Well, depending on the situation. They can go directly to Warren Young, and if need be, then they would come directly, then they or Warren would bring it to my

[2] The maintenance man was referred to as "Wilton Stevens" earlier in the transcript.

> attention. Usually, you know, Warren is around. I won't say, I can't really say that one employee has specifically come to me regarding a particular situation, except for one. And that was regarding, that was Wilton Stephan regarding a pay, you know, a pay raise.

The Employer never asked Young whether he could corroborate this testimony. Moreover, Haynes did not provide any specific facts regarding an actual grievance that Young adjusted, or any evidence that he used independent judgment in doing so.

Based on this record, I am unable to find that the Employer has met its burden to establish that Young is a supervisor as defined in Section 2(11) of the Act. Therefore, he is eligible to vote in the election directed below. I further find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

> All full-time and regular maintenance employees employed by the Employer at its Jamaica facility, excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike

which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local 377, Retail and Wholesale Department Store Union, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before November 16, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. *Club Demonstration*

Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by November 23, 2001.

Dated at Brooklyn, New York, November 9, 2001.

/s/ Alvin Blyer
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